INDEX

	Page
1. Nature of this suit and the theories below	1
2. The liability of the respondent stockholders	2
3. The trust fund theory in Illinois	4
4. Section 49 of the Chancery Act	4
5. Section 53 of the 1919 Corporation Act	5
6. Section 79 of the 1919 Corporation Act	5
7. Other defenses	6

CITATIONS

Cases:	
Abrams v. *Roth & Co.*, 310 Ill. App. 490	5
Bacon v. *National Bank of Commerce*, 259 S. W. 244 (Texas)	3
Boyd v. *Hankinson*, 92 Fed. 49	3
Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405	6
Crumlish v. *R. R. Co.*, 28 W. Va. 623	3
Drennen v. *Jenkins*, 180 Ala. 261	3
Dukes v. *Harrison & Reidy*, 270 Ill. App. 372	6
Gaff v. *Flesher*, 33 Ohio St. 107	3
Hightower v. *Thornton*, 8 Ga. 486	3
Hill v. *Gruell*, 42 Ill. App. 411	5
Insurance Co. v. *Dunscomb*, 108 Tenn. 724	3
Marshall v. *Wittig*, 205 Wis. 510	3
Norton v. *Steinfeld*, 36 Ariz. 536	3
Rowland v. *Meader Furniture Co.*, 38 Ohio St. 269	3
Sarelos v. *McCue & Co.*, 291 Ill. App. 540	6
Standard Distilling Co. v. *Coal Co.*, 239 Ill. 600	5
Steere v. *Hoagland*, 39 Ill. 264	4
Stone v. *Edwards*, 32 Ga. App. 479	3
Wheeler v. *Pullman Iron & Steel Co.*, 143 Ill. 197	5
Statutes:	
Chancery Act, section 49	4
The 1919 Corporation Act:	
Section 53	5
Section 79	5
The 1933 Corporation Act (Ill. Rev. Stat. 1939, ch. 32):	
Sec. 86	5
Sec. 163	5

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 105

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

LUCIUS TETER, ET AL.

REPLY BRIEF FOR THE PETITIONER

Respondents challenge our abbreviated statement of facts as misleading. We in turn think their more elaborate statements and argument leave a picture so confused that a few of the salient points should be clarified.

1. *Nature of this suit and the theories below.*—Petitioner brought this suit on two major theories: (1) Duner was administering the assets of the C. T. C. Investment Company for the benefit of stockholders, and the petitioner as a creditor of the C. T. C. Investment Company had a prior claim (par. 39(e); R. 127); and (2) petitioner as a third party beneficiary could sue directly upon the indemnity agreement of the individual stockholders

(par. 39(d); R. 127). Both theories were urged in the lower courts and considered by the circuit court of appeals (R. 215–218, 218–221). Only the first is advanced here. The selection among alternative theories does not constitute, as one group of the respondents seems to believe (Durbin Br. in Opp. 2–5, 13), a change in theories fatal to our case.

2. *The liability of the respondent stockholders.*—The trust fund theory, if applied to support the petitioner's claim that the assets should be administered for its prior benefit, indicates the liability of the respondent stockholders [1] upon either of two grounds:

(a) If, as charged in the amended complaint (R. 125), Duner is administering the assets for the benefit of the stockholders, the petitioner is entitled under the trust fund theory as accepted by the Illinois courts to have those assets marshalled for the benefit of its prior claim. Since the indemnity agreement (R. 159) is one of the principal assets of the C. T. C. Investment Company, a decree that

[1] The repeated insistence of the respondents (Durbin Br. in Opp. 4, 5, 11, 14, 19, 20) that the stockholders received nothing as a result of dissolution is contrary both to the allegations of the amended complaint (R. 125) and the rule of law that upon dissolution the assets pass to the stockholders subject to the claims of creditors. If, as a matter of fact, Duner is administering the assets for the benefit of someone other than the stockholders and the stockholders have received nothing, this would constitute a factual defence to be pleaded in the appropriate manner.

the petitioner as a creditor is entitled to priority in distribution of the assets would appropriately be joined with a decree that the indemnitors pay over to the receiver their contractual obligation to the C. T. C. Investment Company (see R. 127).

(b) The indemnity agreement is plainly an asset of the C. T. C. Investment Company.[2] The trust fund theory embraces assets which are choses in action.[3] The creditors in recovering assets from the stockholders may bring suit upon the choses in action, else their remedy is meaningless.[4] Accordingly, if the rights represented by the indemnity agreement had in terms been distributed to the stockholders, the creditor of the corporation could sue for recovery of those rights. Duner has made no effort to collect upon the indemnity agreement. This failure to act is equivalent to a distribution of assets, by release of liability, to the stockholders

---

[2] The contrary contention of the respondents (Durbin Br. in Opp. 8, 9) is untenable. The agreement by its terms (R. 159) creates an obligation from the signers to the C. T. C. Investment Company.

[3] The assets which pass to stockholders include choses in action. *Insurance Co.* v. *Dunscomb*, 108 Tenn. 724, 725–727, 736–738; *Stone* v. *Edwards*, 32 Ga. App. 479, 480, 482, 485; *Marshall* v. *Wittig*, 205 Wis. 510; *Bacon* v. *National Bank of Commerce*, 259 S. W. 244, 246 (Texas); *Norton* v. *Steinfeld*, 36 Ariz. 536, 538, 546; *Crumlish* v. *R. R. Co.*, 28 W. Va. 623, 633–634.

[4] See *Drennen* v. *Jenkins*, 180 Ala. 261; *Hightower* v. *Thornton*, 8 Ga. 486, 491–492, 503–504; *Boyd* v. *Hankinson*, 92 Fed. 49, 55 (C. C. A. 4); *Gaff* v. *Flesher*, 33 Ohio St. 107, 112–113; *Rowland* v. *Meader Furniture Co.*, 38 Ohio St. 269.

who signed the agreement. The other stockholders, of course, would have a just complaint at this disproportionate distribution. But certainly a court of equity would not refuse to trace assets rightfully belonging to creditors simply because the recipients have also been favored as against the other stockholders.

3. *The trust fund theory in Illinois.*—The respondents admit the existence of the trust fund doctrine in Illinois (Durbin Br. in Opp. 14, 22; Teter Br. in Opp. 11). They urge, however, that this traditional equity remedy is so qualified by the Illinois statutes that it is unavailable to this petitioner. The petition demonstrates that the Illinois statutes are not construed as a limitation upon the trust fund remedies of Illinois creditors. In this reply we shall suggest merely what seem to be the more important misconceptions of the respondents.

4. *Section 49 of the Chancery Act.*—This section (Pet. 14–15) is inapplicable, and does not require, as respondents urge (Durbin Br. in Opp. 29; Teter Br. in Opp. 8), that a judgment first be recovered against the C. T. C. Investment Company. The corporation is dissolved and, at least in respondent's view, is incapacitated from suit; Duner is administering the assets only for the benefit of the stockholders. Under these circumstances, section 49 does not require a judgment against the corporation. Cf. *Steere* v. *Hoagland,* 39 Ill. 264, 265–267;

Abrams v. *Roth & Co.*, 310 Ill. App. 490, 497, decided June 9, 1941. In any event, *Hill* v. *Gruell*, 42 Ill. App. 411, specifically held that section 49 did not exclude the traditional equity action to recover upon the trust fund doctrine.

5. *Section 53 of the 1919 Corporation Act.*—The requirement of this section (Pet. 13–14) as to the joinder of the corporation does not appear in the 1933 Act (cf. sec. 86 of the 1933 Act), and since it was procedural only was not preserved by section 163 of the 1933 Act (Ill. Rev. Stat. 1939, ch. 32). But even if applicable, the section would not bar an independent equity action to recover upon the trust fund doctrine. The procedure contemplated by section 53 may be available to enforce a trust fund action. See *Standard Distilling Co.* v. *Coal Co.*, 239 Ill. 600. But, as held in *Hill* v. *Gruell*, the statutory scheme is not exclusive. *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204–207, advanced by respondents as holding the statutory relief to be exclusive (Teter Br. in Opp. 9), held merely that the statutory scheme for dissolution was exclusive, and is irrelevant here.

6. *Section 79 of the 1919 Corporation Act.*—This section (Pet. 14), allowing suit against stockholders within a two-year period after dissolution, as we have indicated, is applicable only to the statutory liability of stockholders, and not to their liability as trustees under the trust fund doctrine (Pet. 11). The cases relied upon by the respondents (Durbin

Br. in Opp. 27; Teter Br. in Opp. 6–7) contrary to their assertion, relate solely to the statutory liabilities of stockholders and officers. See *Dukes* v. *Harrison & Reidy,* 270 Ill. App. 372, 374, 381–382; *Consolidated Coal Co.* v. *Flynn Coal Co.,* 274 Ill. App. 405, 406, 412; *Sarelas* v. *McCue & Co.,* 291 Ill. App. 540, 542, 548–549.

7. *Other Defenses.*—The argument (Teter Br. in Opp. 3) that petitioner could not recover even if its contentions under the trust fund theory were accepted, is irrelevant here. The other issues which are raised as barring recovery were not passed upon by the court below and would appropriately be presented to that court if the case were reversed and remanded.

In short, the petitioner has consistently urged that the traditional trust fund doctrine authorizes its recovery against the stockholders who have received the assets of the C. T. C. Investment Company. This contention would point both to the appointment of a receiver to replace Duner, who has been administering the assets for the benefit of the stockholders, and to the recovery of those assets which have already been distributed through the failure to realize upon the rights represented by the indemnity agreement of the individual stockholders. The Illinois courts recognize this procedure, and hold that the statutory procedures and limitations are not exclusive of the power of an equity court to insure that creditors may realize

upon corporate assets prior to the claims of stockholders.

Accordingly, it is respectfully submitted that this petition for writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.
CLAUDE E. HAMILTON, JR.,
General Counsel, Reconstruction Finance Corporation.

AUGUST 1941

U. S. GOVERNMENT PRINTING OFFICE: 1941